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70-37

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

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| IN THE MATTER OF THE APPEAL OF ITT RAYONIER INCORPORATED FROM WASTE DISPOSAL PERMITS NO. T-2867 AND T-3373 ISSUED BY THE DIRECTOR OF THE WATER POLLUTION CONTROL COMMISSION (NOW ABOLISHED) ON MARCH 30, 1970 AND JUNE 29, 1970, RESPECTIVELY. | PCHB DOCKET NO. 70-2 |
| IN THE MATTER OF THE APPEAL OF ITT RAYONIER INCORPORATED FROM THE DIRECTOR OF ECOLOGY'S JANUARY 26, 1971 ORDER DENYING APPLICATION FOR STAY. | PCHB DOCKET NO. 70-37<br><br>FINAL DECISION AND ORDER |

The Pollution Control Hearings Board, having considered the subscribed stipulation appended hereto and otherwise being fully advised,

ORDERS, ADJUDGES AND DECREES that:

1. Findings of fact called for by R.C.W. 43.21B.100 and findings and conclusions as to each contested issue of fact and

law called for by Chapter 371-08 W.A.C. are unnecessary under the circumstances under which this matter has been submitted and they are hereby dispensed with.

2. Docket Nos. 70-2 and 70-37 of this Board hereby are consolidated and made the subject of this single Final Decision and Order concluding both proceedings.

3. Docket No. 70-37 of this Board is terminated and dismissed.

4. The following conditions of Waste Discharge Permit No. T-2867 identified in the heading hereto are modified in the following manner:

A. Condition I.B. shall read:

It is a requirement with regard to permitee's industrial operation that a minimum of 85% of the Sulfite Waste Liquor (SWL) from its total pulp mill wastes be removed prior to discharge into state waters. or that SWL discharges from the total mill wastes be limited to 3,120,000 pounds per day (based on 10 percent solids by weight). In the event permittee elects to comply with the above stated requirement by installing and operating Sulfite Waste Liquor evaporation and burning facilities, permittee shall provide furnace capacity sufficient to remove 90% of the Sulfite Waste Liquor generated by permittee's operation. The implementation of these facilities shall be in accordance with the following requirements:

1. Permittee shall submit a preliminary engineering report describing the type and design of the facilities to the department and obtain an

approval of the same from the department by February 28, 1972.

2. Permittee shall submit final plans and specifications for said facilities to the department by June 30, 1972.

3. Permittee shall complete construction of said facilities and place the same in operation by June 30, 1974.

B. Condition I.C. shall read:

The permittee shall design, construct and place into operation a submarine outfall facility equipped with an adequate diffuser section to permit discharge of the treated mill wastes as provided for in Conditions I.A. and I.B. into the deeper waters of Port Angeles Harbor so as to achieve the maximum waste dilution and dispersion reasonably attainable. The implementation of the foregoing facility shall be in accordance with the following requirements:

1. Permittee shall submit a preliminary engineering report describing the location and design of the proposed outfall facility to the department and obtain approval of the same from the department by August 30, 1971. (The location and design described in said report is to be based upon the results of an extensive evaluation by the permittee of the effectiveness of the proposed outfall facility in adequately dispersing wastes discharged therefrom into Port Angeles Harbor.)

approval of the same from the department by February 28, 1972.

2. Permittee shall submit final plans and specifications for said facilities to the department by June 30, 1972.

3. Permittee shall complete construction of said facilities and place the same in operation by June 30, 1974.

B. Condition I.C. shall read:

The permittee shall design, construct and place into operation a submarine outfall facility equipped with an adequate diffuser section to permit discharge of the treated mill wastes as provided for in Conditions I.A. and I.B. into the deeper waters of Port Angeles Harbor so as to achieve the maximum waste dilution and dispersion reasonably attainable. The implementation of the foregoing facility shall be in accordance with the following requirements:

1. Permittee shall submit a preliminary engineering report describing the location and design of the proposed outfall facility to the department and obtain approval of the same from the department by August 30, 1971. (The location and design described in said report is to be based upon the results of an extensive evaluation by the permittee of the effectiveness of the proposed outfall facility in adequately dispersing wastes discharged therefrom into Port Angeles Harbor.)

2. Permittee shall submit final plans and specifications for the facility and obtain approval of the same from the department by November 1, 1971.

3. Permittee shall complete construction of said facility and place the same in operation by September 30, 1972.

4. From and after September 30, 1972, all wastes from the mill shall be discharged through the outfall facility as provided in Condition I.C.3., except that until corpletion of the facility required by Condition I.B. no more than 15% of the Sulfite Waste Liquor generated by the mill shall be discharged through such outfall facility unless expressly permitted by the Department of Ecology, and any amounts above the aforementioned 15% of the Sulfite Waste Liquor shall be discharged through the presently existing outfalls.

C. Condition I.D. shall read:

The permittee shall remove, by dredging, the existing sludge beds located on the beds of the waterway adjacent to the mill and, when feasible, dispose of the sludge on land. Sludge beds are defined as those bottom deposits asscciated with the mill operations which are over six (6) inches in depth and contain a volatile solids content of ten percent (10%) or greater. Detailed plans for carrying out this activity

will be dependent upon integrating it with the construction of primary treatment as provided in Condition I.A. hereof. Detailed plans shall, however, be submitted by permittee to the department and approval obtained from it no later than June 30, 1972. Completion of the dredging project shall be no later than September 30, 1974. The permittee shall have no obligation to remove any sludge beds or portions thereof if it has been notified in writing by the department that such beds should not be removed.

5. Waste Discharge Permit Nos. T-2867 and T-3373 are hereby merged as Waste Discharge Permit No. T-2867 (3373) as modified under paragraph 4 hereof and the wording of Waste Discharge Permit No. T-3373 is stricken in its entirety.

6. This 'FINAL DECISION AND ORDER' shall be effective immediately upon entry by this Board. The Department of Ecology is directed upon such entry to issue a temporary Waste Discharge Permit No. T-2867 (3373) consistent with the provisions hereof.

STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS BOARD

By _____
MATTHEW W. HILL, Chairman

Approved as to form and for entry by the Board. Notice of Presentment and right to except pursuant to WAC 371-08-205 are waived hereby.

By _____
JAMES T. SHEEHY, Member

By _____
[illegible], Member

FINAL DECISION
AND ORDER

STIPULATION

Appellant, ITT Rayonier, and the State of Washington, Department of Ecology, through their attorneys hereby stipulate, for the purposes of compromise and settlement of the contested cases now subject to the jurisdiction of the Pollution Control Hearings Board of the State of Washington under the Board's Docket Numbers 70-2 and 70-37, as follows:

That the "FINAL DECISION AND ORDER" to which this "STIPULATION" is appended may be entered by the Board and the parties hereto waive all right to except thereto or right to seek judicial review relating to the entry thereof.

DATED this 30th day of March, 1971.

TIMOTHY S. WILLIAMS
General Counsel
ITT Rayonier, Incorporated

DE FOREST PERKINS

BURROUGHS C. ANDERSON

Attorneys for Appellant,
ITT RAYONIER, INCORPORATED

CHARLES B. ROE, JR.
Senior Assistant Attorney General

CHARLES W. LEAR
Assistant Attorney General

Attorneys for State of Washington,
Department of Ecology

BEFORE THE POLLUTION CONTROL HEARINGS BOARD

STATE OF WASHINGTON

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| APPEAL FROM CIVIL PENALTY IMPOSED BY SOUTHWEST AIR POLLUTION CONTROL AUTHORITY AGAINST CUMMINS OREGON DIESEL, INC. | ) ) ) ) ) | HB 70-3<br>FINDINGS OF FACT AND ORDER |

This matter came on for hearing at 1 p.m., November 20, 1970, in the hearing room in the Longview Public Library, before two members of the Pollution Control Hearings Board, Matthew W. Hill and Walt Woodward, with the appellant, Cummins Oregon Diesel, Inc. appearing by its service manager, David Rickman; and the respondent, Southwest Air Pollution Control Authority, appearing by Edward V. Taylor, its executive director and James Ladley, its attorney.

It was conceded at the outset that there was a burning of lube filters and fuel filters on the premises of the appellant on July 13, 1970; that no burning permit had been secured or requested; and that such burning was in violation of the duly and regularly adopted regulations of the Southwest Air Pollution Control Authority.

Witnesses on behalf of the Southwest Air Pollution Control Authority were sworn and testified, and David Rickman testified on behalf of the appellant, Cummins Oregon Diesel, Inc.

On the basis of the testimony and the concessions made, the Pollution Control Hearings Board makes the following

FINDINGS OF FACT

I.

That on July 13, 1970, the appellant, Cummins Oregon Diesel, Inc., at its premises in Longview, Washington (23rd S. Vaughn) did burn a considerable number of lube oil filters and fuel filters, resulting in the creation and release of black smoke in considerable quantities; that no permit had been secured for such burning, and that it was in violation of the properly adopted rules and regulations of the Southwest Air Pollution Control Authority;

II.

That the penalty appealed from ($100 fine) was properly imposed by the Southwest Air Pollution Control Authority;

III.

That while David Rickman, service manager of the appellant Cummins Oregon Diesel, Inc., is to be commended for his frankness and obvious sincerity, and the improvements made in the appearance of the premises, they do not constitute an excuse for the burning without a permit, nor do they constitute a justification for the mitigation of the penalty imposed.

MATTHEW W. HILL, Chairman

WALT WOODWARD, Member

Based on the foregoing Finding of Facts, the Pollution Control Hearings Board at its meeting on December 1, 1970, makes and enters the following

ORDER AFFIRMING THE PENALTY IMPOSED BY THE SOUTHWEST AIR POLLUTION CONTROL AUTHORITY

The Order of the Southwest Air Pollution Control Authority, imposing a $100 penalty on Cummins Oregon Diesel, Inc. from which penalty this appeal was prosecuted, is affirmed.

DONE at Olympia, Washington, this 1st day of December, 1970.

STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS BOARD

By _____
MATTHEW W. HILL, Chairman

_____
WALT WOODWARD, Member

The third member of the State of Washington Pollution Control Hearings Board, having familiarized himself with the complete record on this appeal, concurs in the foregoing Findings of Fact and Order.

_____
JAMES T. SHEEHY, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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| IN THE MATTER OF LITTLE SPOKANE COMMUNITY CLUB,<br><br>Appellant,<br><br>vs.<br><br>STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br><br>Respondent,<br><br>HOWARD H. GATLIN,<br><br>Intervenor. | PCHB No. 70-7<br><br>FINDINGS OF FACT, CONCLUSIONS AND ORDER |

This matter is the appeal by the Little Spokane Community Club of Surface Water Permit No. 16229 (issued under Application No. 21149) granted to Howard H. Gatlin, intervenor, by the State of Washington, Department of Ecology, respondent. It came before the Pollution Control Hearings Board (Walt Woodward, hearing officer) at a formal hearing held in the Spokane County Courthouse, Spokane, Washington at 1:00 p.m., April 19, 1972, and continuing on April 20, 21 and 25, 1972.

Appellant appeared through Kermit Rudolf, intervenor through Joseph P. Delay and respondent through Charles W. Lean, assistant attorney general. Nora Fay Gasman, court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were offered and admitted. Counsel submitted briefs.

After reviewing the transcript, studying exhibits, considering the argument of counsel and after having considered Exceptions to its Proposed Order, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

The subject body of water, the Little Spokane River, is a non-navigable stream which flows in a southerly direction in Spokane County to a point some ten miles north of the City of Spokane, then swings wes where it joins the Spokane River. The portion of the Little Spokane River under consideration in this matter lies between the communities of Chattaroy on the north and Dartford on the south. Human use of this section of the river has undergone a gradual metamorphosis from an earlier and almost exclusive condition of farming, dairying and cattle raising to the present and predominant establishment of suburban homes.

II.

Howard H. Gatlin, intervenor in this matter, is the owner of a 200-acre tract near the western side of the Little Spokane River at Buckeye, a point much closer to Chattaroy than to Dartford. In 1968, he began to pump water from the Little Spokane River to his non-riparian acreage for sprinkler irrigation of alfalfa as feed for cattle. On August 9, 1968 he filed application for a water appropriation permit of 2.8 cubic feet

per second (cfs) with the then State of Washington, Department of Water Resources, a predecessor agency to respondent. After receiving a complaint from appellant, the Department of Water Resources conducted a field examination on August 28, 1968. Intervenor complied with an order of the Department to cease pumping until he had obtained a permit. On July 29, 1970, respondent approved a finding that "water is available for appropriation for a beneficial use" to the amount of 2.0 cfs, and that this appropriation "will not impair existing rights or be detrimental to the public welfare."

III.

Respondent, noting in its finding of July 29, 1970, that 48 protests were on file opposing the Gatlin withdrawal, notified appellant, whose membership included most of the protesters, of the finding on July 30, 1970. On August 27, 1970, appellant protested the withdrawal in a letter to respondent. On September 11, 1970, respondent granted intervenor Surface Water Permit No. 16229 in accordance with the terms specified in respondent's finding of July 29, 1970. On September 14, 1970, intervenor began construction of his water system and subsequently withdrew water from the Little Spokane River under terms of Permit No. 16229. On September 15, 1970, the members of the Pollution Control Hearings Board, a newly created state agency, were sworn into office. On November 4, 1970, the Pollution Control Hearings Board advised respondent that appellant's letter of August 27, 1970 constituted a "timely protest" for purposes of this appeal.

IV.

At least 68 acres of intervenor's non-riparian acres are irrigable.

V.

There is no proof in the record that intervenor's irrigation under Permit No. 16229 is a profitable enterprise.

VI.

Intervenor's withdrawal of water under Permit No. 16229 reduces the amount of water flowing downstream from the point of withdrawal from two to four percent during dry spell, low-water periods.

VII.

During 1968, the lowest flow year of record in the 1960 decade, the Little Spokane River was flowing at 92 cfs during the lowest period of that year at the gaging station at Dartford, several miles downstream from the point of intervenor's withdrawal. Between the point of withdrawal and Dartford, at least two tributary streams enter the Little Spokane River. The Little Spokane River, at the point of intervenor's withdrawal, contains about 80 percent of the volume of water registered at the Dartford gaging station.

VIII.

Starting in the summer of 1968 and continuing from that time, riparian residents of the Little Spokane River downstream from intervenor's point of withdrawal noticed several critical changes in the river flow past their properties. These included insufficient water for their accustomed pursuits of swimming, diving, boating, canoeing and river floating, and a necessity to move water pumps further out into the stream.

IX.

Any lowering of the volume of water in the Little Spokane River

flowing past Pine View Park, a major facility of the Spokane County Park Department located downstream from intervenor's point of water withdrawal, has a deleterious effect on the public's use and enjoyment of that park.

X.

Respondent, while conceding in its finding of July 29, 1970 that the river's "value to the public for its recreational and esthetic benefits should not be underestimated nor undermined," made no detailed field investigation of appellant's protests.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS

I.

Before considering the specifics of this matter, the Pollution Control Hearings Board first takes note of a gradual change over the years relative to the accepted uses of public waters. Riparian rights, once paramount, gave way in the arid West to the doctrine of non-riparian appropriation for beneficial use. More recently there has been a recognition that esthetic and recreational uses of public water are as important as earlier, historical rights of irrigation. Riparian rights for recreational purposes on non-navigable lakes have been recognized in decisions of the State Supreme Court and it may be reasonable to assume that the court some day may also apply this doctrine to non-navigable streams. In any event, the Water Resources Act of 1971, stating that public waters of the state are to be "protected and fully utilized for the greatest benefit to the people," includes use of water

for "recreational" purposes and "preservation of environmental and esthetic values" among its "general declarations of fundamentals."

II.

In the instant matter there appears to be a classic example of this gradual change in acceptable uses of public water bodies. Once a farming region dependent to a great extent on irrigated water removed from the Little Spokane River, the area between Chattaroy and Dartford today--intervenor's non-riparian acreage being an exception--is almost entirely devoted to the development of river bank and upland "country living" homesites. The Little Spokane River has changed from an agricultural stream to a residential brook but respondent, in its field examinations and consideration of intervenor's application, took no more notice of this basic change in the use of the Little Spokane River than to make a cursory acknowledgment in its finding that "irrigation and esthetic benefits should not be . . . undermined." It well could be asked, therefore, what agency of the state government is to prevent such undermining if not respondent? Respondent cannot shirk its responsibility for establishing minimum flows by saying that a "specific flow necessary for recreational and esthetic purposes has not been made." Is the Little Spokane River, now primarily a residential brook, to be drained dry by irrigation withdrawals simply because respondent has not gotten around to making a minimum flow study? We think not.

III.

We attach no great significance to the apparent discrepancies between the Dartford gaging station records and the testimony of appellant's witnesses as to the level of the river flowing past their

properties. The important consideration is not the measured volume of water still flowing in certain deep channels; the critical consideration is the fact that, since 1968, riparian residents have found that the river, which once lapped their shores, has receded so much that they are prevented from accustomed aquatic pursuits. There is no proof that intervenor's withdrawal caused this change in the river flow. In our view, none is needed. The fault lies in respondent's failure to recognize that the general condition of the river, from whatever cause, had deteriorated to the detriment of riparian residents and to general citizens' use and enjoyment of a large public park. We conclude, therefore, that respondent erred in finding (1) that there was water available for appropriation, and (2) that intervenor's appropriation is not detrimental to the public interest.

IV.

The third criterion by which respondent must test every surface water application is whether there is a beneficial use. Certainly, intervenor's stated objective of growing alfalfa for cattle raising is a beneficial one. Intervenor, although invited to do so, did not furnish proof that his enterprise is a profitable one. He failed to produce evidence at the hearing to sustain his claim that it is profitable. He was given a post-hearing opportunity to show by his financial records that his project is profitable and therefore, a beneficial use which does not waste his appropriated water. He has failed to make such post-hearing proof. We must conclude, therefore, that there is doubt as to the beneficial use to which intervenor is putting his appropriated water.

V.

We come now to the curious set of circumstances surrounding this appeal. The Pollution Control Hearings Board always has recognized that appellant's letter to respondent of August 27, 1970 was a timely appeal to this Board. This has been tested twice in court and the Pollution Control Hearings Board's position has been twice sustained. This, however, cannot be taken as an implied criticism of respondent for granting a permit which later became the subject of appeal. There were mitigating circumstances surrounding the establishment of the Pollution Control Hearings Board. Accepted procedures and lines of communication had not been well established during the period when the permit was granted and the appeal was recognized. By the same token, intervenor cannot be condemned for constructing a water withdrawal system after being granted the permit and while this appeal was moving to the stage of formal hearing. We are inclined to grant the appeal in toto, but we feel our judgment must be tempered with a recognition of the obvious good faith of respondent during the confused period of organization during which the appeal was accepted. Our judgment also must recognize the legal right of intervenor to test the validity of the acceptance of the appeal by the Pollution Control Hearings Board.

VI.

The applicable law at the time of this application was RCW 90.03.290 which directs that the Department shall reject an application if

". . . the proposed use . . . threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, . . ."

We do not know what evidence the Department considered in reaching its conclusion in approving the proposed use of 2.0 cfs for a marginal irrigation project, but the evidence before this Board on this appeal established conclusively that the proposed use would be detrimental to an already imperiled public interest in the lower reaches of the Little Spokane River, which the Legislature by its 1971 enactment (somewhat belatedly) moved to protect.

We do not impugn the motives of the Department of Ecology in granting this permit to the intervenor, Howard A. Gatlin. On this appeal we have had the advantage of considerable evidence not before the Department, as to the character and the extent of the public interest in the Little Spokane River below the point of the intervenor's diversion.

The evidence before us establishes that the diversion would be, and was, detrimental to the public interest, having due regard to the highest feasible use of the water belonging to the public.

In view of these Conclusions, the Pollution Control Hearings Board makes this

ORDER

Permit No. 16229 is remanded to respondent for modification as

follows:

1. Flow meters shall be installed at both the river pumping station and the spring diversion; such meters shall be capable of measuring the instantaneous rate of diversion as well as the total volume of water pumped over any irrigation season.

2. Intervenor is to be permitted to withdraw water from the Little Spokane River for the irrigation of 68 acres, not to exceed 570 g.p.m. and 235 acre-feet per year, less the amount of water which respondent finds is available from intervenor's spring, said modified permit to remain in force until such time as the results of a minimum flow study by respondent has been made, at which time said permit will be subject to that minimum flow as is established.

3. At such time as certificate of water right might issue under Permit No. 16229, respondent shall reduce the quantities of water appropriated if the flow measurement readings find a lesser quantity of water is needed than as are identified in (2) above.

DONE at Olympia, Washington this 2nd day of January, 1973.

POLLUTION CONTROL HEARINGS BOARD

WALT WOODWARD, Chairman

MATTHEW W. HILL, Member

JAMES T. SHEEHY, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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| IN THE MATTER OF BILL WILLIAMS (Ground Water Application No. 10522), Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent. | PCHB No. 70-9<br>FINDINGS OF FACT, CONCLUSIONS AND ORDER |

This is an appeal by Bill Williams, an adjoining property owner, from the Report, Findings of Fact and Decision, dated August 25, 1970, of respondent granting Ground Water Application No. 10522 of Edward H. Kirschbaum, Jr., for an appropriation permit.

This matter first came before the Pollution Control Hearings Board in an informal conference (WAC 371-08-105) in Olympia, Washington, October 30, 1970. At the conclusion of that hearing, it appeared to the Board that the various parties of this matter were working toward an amicable settlement. The Board, therefore, held this matter open.

The settlement, however, did not materialize. A prehearing conference (WAC 371-08-125) was held by the Board in Olympia on April 7, 1971. Appellant did not appear.

Respondent moved to dismiss this matter on the grounds of

failure of appellant to appear at the pre-hearing conference.

At the hearing of the Board on respondent's motion to dismiss, held in Olympia on April 21, 1971, appellant appeared and declared he wished to activate his appeal. The motion to dismiss was then denied.

The hearing on the appeal was held by the Board (Walt Woodward, hearing officer) at 1:30 p.m., May 17, 1971, in the King County Administration Building, Seattle. Appellant represented himself; respondent was represented by Charles W. Lean, Assistant Attorney General. Stenographic report was prepared by Louise Blakely of the court reporting firm of Shirley W. Marshall, Seattle.

Witnesses were sworn and testified, and exhibits were admitted.

On the basis of testimony and exhibits, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

There is a limited amount of public water available for domestic use during the summer months in the general residential area of Orcas Island, San Juan County, described in Ground Water Application No. 10522.

II.

There is a dispute between appellant and Edward H.

Kirschbaum, Jr., the applicant in Ground Water Application No. 10522, as to the best method of sharing this limited amount of water. Efforts by this Board, assisted by respondent, have failed to achieve a mutually satisfactory method of sharing the water.

III.

There are public ground waters available for appropriation on the Kirschbaum property.

IV.

The use of water to be withdrawn under Ground Water Application No. 10522 is a beneficial one.

V.

Ground Water Application No. 10522 is first in time of record with respondent.

From the foregoing Facts, the Pollution Control Hearings Board draws the following

CONCLUSIONS

I.

It is regrettable that adjoining property owners have not agreed on a cooperative method of sharing the limited amount of available water.

II.

Respondent, first having participated in efforts to achieve this cooperative method, cannot be faulted for ultimately recognizing the statutory rights of Edward H. Kirschbaum, Jr.,

in Ground Water Application No. 10522.

III.

Respondent, by restricting the proposed permit for Ground Water Application No. 10522 to two gallons per minute, 0.33 acre-feet per year, is recognizing the limited amount of water available in the general area.

Upon these Findings of Fact and Conclusions, the Pollution Control Hearings Board affirms respondent's action in granting Ground Water Application No. 10522.

DONE at Olympia, Washington this 23rd day of July 1971.

POLLUTION CONTROL HEARINGS BOARD

Matthew W. Hill, Chairman

James T. Sheehy, Member

Walt Woodward, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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| IN THE MATTER OF STONEWAY CONCRETE, INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent. | HB No. 70-11<br>FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

THIS MATTER being an appeal of an order denying an application for a waste discharge permit; having come on regularly for hearing before the Pollution Control Hearings Board on the 2nd and 3rd days of October, 1974, at Seattle, Washington; and appellant, Stoneway Concrete, Incorporate appearing through its attorney, Lyle L. Iversen and respondent, Department of Ecology, appearing through its attorney, Wick Dufford, Assistant Attorne General; and Board member present at the hearing being Chris Smith and the Board having read the transcript, examined the exhibits, records and files herein and having entered on the 3rd day of December, 1974,

its proposed Findings of Fact, Conclusions of Law and Order, and the Board having served said proposed Findings, Conclusions and Order upon all parties herein by certified mail, return receipt requested and twenty days having elapsed from said service; and

The Board having received no exceptions to said proposed Findings, Conclusions and Order; and the Board being fully advised in the premises; now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed Findings of Fact, Conclusions of Law and Order, dated the 3rd day of December, 1974, and incorporated by this reference herein and attached hereto as Exhibit A, are adopted and hereby entered as the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DONE at Lacey, Washington, this 7th day of January, 1975.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

Chris Smith
CHRIS SMITH, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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| IN THE MATTER OF STONEWAY CONCRETE, INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent. | HB No. 70-11<br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

This matter, the appeal of an order denying an application for a waste discharge permit, came before the Pollution Control Hearings Board, Chris Smith presiding, at a formal hearing in Seattle, Washington, at 9:45 a.m., October 2 and 3, 1974.

Appellant Stoneway Concrete, Inc., was represented by its attorney Lyle L. Iversen; Respondent Department of Ecology appeared through its attorney, Wick Dufford, Assistant Attorney General. Richard Reinertsen and Sherri Darkow, Olympia court reporters, recorded the testimony.

Having read the transcript and having seen the exhibits, and

EXHIBIT A

being fully advised, the Pollution Control Hearings Board makes the following

## FINDINGS OF FACT

### I.

Appellant is Stoneway Concrete, Inc., a manufacturer and merchandiser of sand and gravel aggregates. It is presently located in King County. Appellant is the lessee of approximately 500 acres of land belonging to Weyerhaeuser Properties, Inc. The land is presently covered with second growth timber and underbrush. Soos Creek lies outside the northern and western boundaries of Appellant's property. Soos Creek Fish Hatchery, the fourth largest fish hatchery in the State of Washington, lies on the creek due west from Appellant's property.

### II.

Appellant proposes to exploit the leased land for the purpose of removing the sand and gravel resources thereunder. Appellant has applied for and has received a permit for its operation from King County. Such permit was subject to 24 conditions. One such condition was that approval from Respondent Department of Ecology be received by Appellant (Appellant's Exhibit A-1, Item 10). Appellant made application for a waste discharge permit showing that no waste would be discharged. The application was denied by the Department after concluding that:

> "The closed circuit system proposed in Stoneway Concrete Inc.'s application for a waste discharge permit, while being an acceptable design for eliminating polluting discharges to public waters, cannot be guaranteed as fail-safe." Appellant's Exhibit A-5.

### III.

The proposed plant is somewhat centrally located upon 23 acres of

the 500-acre site. Before any operation begins, the underlying sand and gravel beneath the 23 acres will be removed. The plant machinery will thereafter be placed in the resulting 20 foot depression. (See Appellant's Exhibit A-12, Section AA) Strip mining will thereafter occur extending outward from the plant site over the following 35 years. (See Appellant's Exhibit A-8 through A-11) A 150-foot buffer zone consisting of the existing trees and undergrowth shall remain around the 500-acre site. (Appellant's Exhibit A-1, App. C, p.1, Condition 2) No more more than 40 acres will be mined at any one time. (Appellant's Exhibit A-1, App. C, p.2, Condition 7) After a 40 acre increment is mined, the topsoil will be replaced and the area reseeded with perennial grasses. (Appellant's Exhibit A-6, p.12)

IV.

The proposed plant includes a rock crusher and a washing plant. Upon entering the primary stage of the plant process, the sand and gravel from the mined area is initially separated. The material of one and one quarter inch (minus) size is separated from the larger stone and segregated according to a desired size by various screens. The larger material is sent to a rock crusher and reduced to a desired size. The crushed material is thereafter washed and separated by gravel size through various screens. A relatively small amount of water (50-100 GPM) is used to control dust during the rock crushing phase. The great majority of the water (2000-2200 GPM) is used during the washing and separating operation. At the end of the washing process, a flocculating agent (NALCO No. 634) is added at a rate of 4 ounces per minute to the water in order to accelerate the settling

of the suspended silt. This water is sent to a 150'x280'x10' settling pond (primary pond Nos. 1 or 2, Appellant's Exhibit A-7) where the silt coagulates and falls to the bottom of the pond. The resulting "clean, clear" water enters a 150'x280'x10' secondary pond over a weir. When one settling pond is full, the silt is removed and stockpiled elsewhere for use as future fill material. During this clean-out period, the alternate settling pond is used.

V.

The silt effectively seals the bottom of both primary ponds. Any water seepage through the seal would be insignificant in amount and effect. Moreover, the pond is self-sealing if the seal should be accidentally broken during the cleaning-out process. The self-sealing action is caused by the settling of more silt into the leak, which in turn plugs the leak.

The bottom of the secondary pond would be constructed to be impervious to water. Any water seepage through the bottom would be inconsequential in amount and effect. The water contained in this pond would be returned to the plant and reused. The cycle is thereafter repeated. Any water loss from absorption and evaporation is made up from the 100'x200'x10' storm pond or water from a well.

A storm pond provides the 23-acre plant site a reservoir for excess water in the site area. If the storm pond becomes full, the excess water is pumped to a 2-acre by 4 foot deep storm lake (storm lake #1 during the first 25 years; storm lake #2 thereafter). (See Appellant's Exhibit A-10) The water in the storm lake is allowed to seep into the ground where it eventually reaches the ground water.

Silt and very small amounts of the flocculating agent residue may be present in the water discharged into the storm lake.

VI.

It is highly improbable that water would escape the depressed 23-acre plant site into the surrounding area except through the storm pipeline and storm lake. The initial mining of areas adjacent to the site would provide a further system of containment on the 500-acre property by the creation of artificial "basins" to hold water. (See Appellant's Exhibit A-12) The risk of water reaching Soos Creek from a break in the storm pipeline is very minimal. The proper sizing of the storm lake, with adequate excess capacity, would provide adequate safety for unusual storms.

Storm water in the mined areas would either remain in the depression created or would be pumped to the storm lake. In any event, the system of dikes in the surrounding berm would adequately contain any silt-bearing water and prevent its entry into Soos Creek.

VII.

Appellant has represented that the only flocculating agent that shall be used will be NALCO 634. The parties stipulated that this agent, if used as proposed, is non-toxic to fish life. In any event, the greater portion of the residue from the flocculating agent is absorbed by the soil.

VIII.

Silt in the storm lake from Appellant's operation will not travel any significant distance through the subsurface soil towards Soos Creek. The probability that the silt will filter through the subsurface soil

and reach Soos Creek is almost none.

IX.

The testimony at the hearing revealed no known better plan of operation compared with Appellant's proposed plan. Appellant has taken all reasonable precautions in the design of its plant to insure that silt would not reach Soos Creek.

X.

Any Conclusion of Law hereinafter deemed to be a Finding of Fact is herewith adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

There are two issues that will decide the outcome of this case:

a. Is a waste discharge permit required under chapter 90.48 RCW for the type of operation proposed by Appellant?

b. If the answer to a. be in the affirmative, did Respondent Department of Ecology properly deny the permit?

II.

RCW 90.48.160 provides that:

> Any person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material into the waters of the state, including commercial or industrial operators discharging solid or liquid waste material into sewerage systems operated by municipalities or public entities which discharge into public waters of the sate, shall procure a permit from the pollution control commission before disposing of such waste material: . . . .

"Waste material" in the above statute includes excess storm water

which has been comingled with the wash water or other industrial residues. The excess water from Appellant's 23-acre plant site is not the same water that would be naturally absorbed. Rather, it becomes mixed with silt and other waste material, e.g., spilled oil, that inevitably follows from this type of industrial operation. Appellant's operation specifically contemplates the use of the storm pond and storm lake as safety reservoirs for excess water. The evidence shows that the water from the storm lake will reach the ground water, which water constitutes "waters of the state". RCW 90.48.020. Therefore, a waste discharge permit is required even though no waste under normal conditions may ever occur. The fact that the waste water will carry minimal impurities under normal conditions goes not to the requirement of a permit, but rather to the issuance of the permit.

III.

Having concluded that a waste discharge permit is required, did the Respondent Department of Ecology properly deny the permit?

RCW 90.48.180 provides that a permit shall be issued unless the Department finds that the waters of the state will be polluted in violation of the policy of RCW 90.48.010:

> "The Commission shall issue a permit unless it finds that the disposal of waste material as proposed in the application will pollute the waters of the state in violation of the public policy declared in RCW 90.48.010."

RCW 90.48.010 provides that:

> It is declared to be the public policy of the state of Washington to maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of wild life, birds, game, fish and other aquatic life, and the industrial development of the state, and to that end require

> the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington. Consistent with this policy, the state of Washington will exercise its powers, as fully and as effectively as possible, to retain and secure high quality for all waters of the state. The state of Washington . . . proclaims a public policy of working . . . to extinguish the sources of water quality degradation . . . . (emphasis supplied)

"Industrial development" is not inconsistent with this policy. Rather, industry is required to use "all known available and reasonable methods" to prevent and control pollution.

The proposed plant uses all known available and reasonable methods to comply with the policy of RCW 90.48.010. To require that a system be "fail-safe" is not reasonable. The facts of the matter amply illustrate that the probability of silt reaching Soos Creek is almost zero. The residual flocculating agent, which is present only in trace amounts, and is in any event a harmless agent, presents no threat to water quality or to the concerns of RCW 90.48.010. Moreover, Respondent could not present any evidence of a method that would be superior to the method employed by Appellant.

Respondent Department of Ecology improperly denied the permit.

IV.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Accordingly, the Pollution Control Hearings Board issues this

ORDER

The order denying the issuance of a waste discharge permit is reversed.

Under ordinary circumstances, we would also order the Department

of Ecology to issue the permit. However, since the State Environmental Policy Act, 43.21C RCW, now applies to permit issuances, we remand for the appropriate action in accordance with the applicable law.

DATED this 31st day of ~~October~~ December, 1974.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

(Did not participate in this appeal)
W. A. GISSBERG, Member

Chris Smith
CHRIS SMITH, Member

BEFORE THE

POLLUTION CONTROL HEARINGS BOARD

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| IN THE MATTER OF THE APPEAL OF LIANGA PACIFIC, INC. FROM PENALTY ASSESSED BY PUGET SOUND AIR POLLUTION CONTROL AGENCY | PCHB NO. 70-14<br><br>ORDER AFFIRMING PENALTY |

This is an appeal by Lianga Pacific, Inc. from a civil penalty of $250.00 by the Puget Sound Air Pollution Control Agency, for the burning of waste material on September 23, 1970. It came on for hearing before the Pollution Control Hearings Board (James T. Sneeny and Matthew W. Hill, the latter being the Presiding Officer), on March 17, 1971, in Tacoma, Washington. The Puget Sound Air Pollution Control Agency presented as exhibits, pictures of the fire in question, and testimony as to the type of material being burned, and testimony that no approval had been given for the fire, Lianga Pacific, Inc. presented its testimony, explaining its reasons for the burning.

From the evidence presented, the Board makes the following

FINDINGS OF FACT

The outdoor fire in question was of waste material from construction work, and as shown by the pictures taken of it, was of substantial size. Such a fire was in violation of Section 9.02 of the Regulations of the Puget Sound Air Pollution Control Agency,

and Lianga Pacific, Inc. had been warned that such a fire would be a violation of the Agency's Regulations.

The defense, in essence, was not a denial of the fire or the lack of approval from the Agency, but rather that Lianga Pacific, Inc. was the victim of discrimination in that others burned in violation of the regulation and were not penalized

From these facts, the Pollution Control Hearings Board concludes that Lianga Pacific, Inc. is guilty of a violation of Regulation 9.02 of the Puget Sound Air Pollution Agency, and that under the circumstances, the fine of $250.00 is permissible and not unreasonable.

And based on the foregoing Findings and Conclusions, the penalty appealed from is affirmed.

DONE at Olympia, Washington this 6th day of April, 1971.

POLLUTION CONTROL HEARINGS BOARD

By _____
Matthew W. Hill, Chairman

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James T. Sheehy, Member

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Walt Woodward, Member

BEFORE THE

POLLUTION CONTROL HEARINGS BOARD

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| IN THE MATTER OF THE APPEAL OF ROYAL OAKS, FROM PENALTY ASSESSED BY PUGET SOUND AIR POLLUTION CONTROL AGENCY | HB NO. 70-15<br><br>ORDER AFFIRMING PENALTY |

This is an appeal by Royal Oaks, a limited partnership, from a civil penalty of $250.00 by the Puget Sound Air Pollution Control Agency, for the burning of waste material on June 5, 1970. It came on for hearing before the Pollution Control Hearings Board (James T. Sheehy and Matthew W. Hill, the latter being the Presiding Officer), on March 17, 1971, in Tacoma, Washington. The respondent, Puget Sound Air Pollution Control Agency, presented as exhibits, pictures of the fire in question, and testimony as to the material being burned, and that no approval had been given for the fire.

The appellant conceded that there was a fire at the time and place indicated in the civil penalty notice, but made the contention that the fire was covered by an "Air Pollution Approval for Burning of Natural Vegetation," and advanced the contention that two-by-fours and other scrap lumber being burned was "natural vegetation," and that in any event, others were burning the same kind of material and were not being penalized.

From the evidence presented, the Board makes the following

## FINDINGS OF FACT

The outdoor fire in question was burning waste material from construction work, and as shown by the pictures taken of it, was of substantial size. Such a fire was in violation of Section 9.02 of the regulations of the Puget Sound Air Pollution Control Agency, and Royal Oaks had been warned that such a fire would be a violation of the Agency's regulations;

That the lumber and timber scraps being consumed in this fire were not "vegetation" within the purview of an approval for the burning of "natural vegetation."

## CONCLUSIONS

From these facts, the Pollution Control Hearings Board concludes that Royal Oaks is guilty of a violation of Regulation 9.02 of the Puget Sound Air Pollution Control Agency, and that under the circumstances, the fine of $250.00 is permissible and not unreasonable.

Based on the foregoing Findings and Conclusions, the penalty appealed from is affirmed.

DONE at Olympia, Washington this 6th day of April, 1971.

POLLUTION CONTROL HEARINGS BOARD

By _____
Matthew W. Hill, Chairman

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James T. Sheehy, Member

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Walt Woodward, Member